**GNSO Review Working Party Statement on Westlake Governance’s   
Final GNSO Review Report**

To: ICANN Board Organizational Effectiveness Committee (OEC)

Ref: <https://www.icann.org/news/announcement-2-2015-09-15-en>

In advance of OEC consideration of the Final GNSO Review prepared by Westlake Governance, the GNSO Review Working Party submits the following comments. The Working Party wants to thank Westlake for delivery of their final report and for participation in our meetings. We also want to thank the staff members who provided consistent and invaluable support throughout the process.

Overall we believe that the Review contains some useful recommendations that could contribute to ongoing GNSO improvement, and, we, as a team, are committed to contribute to the work that will need to be done going forward to provide additional detail and to assist in implementation.

There is one recommendation that we want to specifically comment on at this time:

**Revised Recommendation 23 in the Final Report**: In order to support ICANN's multi-stakeholder model, all Cs should have seats on the GNSO Council, allocated equally (as far as numerically practicable) by their SGs.

While all of the other recommendations were discussed with the Working Party, the first time that the Working Party saw Revised Recommendation 23 was in the Final Report. In a Working Party Call held on Wednesday, September 16, Westlake called attention to this new recommendation and noted that the rationale was contained on pages 91-94.

Specific Concerns about Recommendation 23

1. As acknowledged by Westlake in their rationale, the recommendation focuses only on the present state of the Council and would not work if any Stakeholder Group ever has more than six Constituencies in the case of the Non-Contracted Party House, or more than three in the Contracted Party House, which does not have constituencies at present.
2. Recommending that “all Cs should have seats on the GNSO Council, allocated equally (as far as numerically practicable” seems to assume that all Constituencies are equal with respect to mission clarity, member engagement, and contributions to GNSO work. What evidence is there for this? What does ‘allocated equally’ mean?
3. If this recommendation is implemented it could incent groups to form Constituencies simply in order to get seats on the Council, financial and staff support, and related benefits. Using the Registries Stakeholder Group as an example, additional seats on the Council could be gained by dividing the RySG into more than three Constituencies. That in turn could require a structural change in the Council, which was out of scope for the GNSO Review.
4. Westlake makes the following conclusions in its rationale that are questionable:
   1. The first sentence of the second full paragraph on page 92 says, “If a Constituency is not represented at the GNSO Council, its input can be marginalized, and its members effectively disenfranchised.”
      1. Westlake assumes that direct representation on the Council is required for a Constituency to maximize its effectiveness.
         1. There is no empirical evidence that having direct representation on the Council necessarily increases a constituency’s mission clarity, membership, or contributions to GNSO work.
         2. Moving across the board to a constituency rather than stakeholder group model for the election of Councilors would undermine the rationale for doing policy work and agreeing positions at the stakeholder group level. Each constituency is then responsible for fully participating in all processes and crafting its own positions on all issues rather than benefitting from the efforts of its stakeholder group partners. This would be illuminating, but whether it would really increase effectiveness is rather uncertain.
         3. Westlake’s recommendation would do much to strengthen the construction of tribal silos, perhaps now with moats surrounding them.
         4. Moreover, the assumed linkage between constituency representation and effectiveness definitely does not apply with regard to the GNSO’s primary function of policy development because participation in working groups is open to all regardless of seats on the Council. This is vitally important to how the bottom-up multi-stakeholder process of the GNSO’s PDP works. Openness to membership and participation in PDP working groups is not limited to members of GNSO SGs and Cs. GNSO PDP working group membership is open to anyone, whether they are affiliated with the GNSO, any other SO/AC of ICANN, in addition to completely unaffiliated individuals/organizations that wish to participate in gTLD policy development at ICANN. Working group members who are not members of a GNSO SG/C are fully a part of the working group policy development process and consensus building of policy recommendations made to the GNSO Council.
         5. Representation on the Council could impact a Constituency’s influence when the Council takes a vote but votes only occur in situations like the following:
            1. Confirming that a Policy WG has appropriately followed the PDP and WG Guidelines and sending WG recommendations to the Board.
            2. Election of Council officers.
            3. Approving motions for miscellaneous Council actions in fulfilling the Council’s role as the manager of the policy development process.
      2. Westlake also assumes that absence of direct representation on the Council disenfranchises a Constituency.
         1. As stated above, a Constituency’s ability to participate in policy development is not impacted at all by whether it has a representative on the Council or not. The record clearly demonstrates that there are constituencies that do not have “their own” Councilors but yet participate extensively in policy development and other ICANN work.
         2. It is feasible that a Constituency would believe it has less influence if it doesn’t have a seat on the Council and there have been groups that held this view, but that could be remedied by modifications to a Stakeholder Group’s procedures to ensure that all of its Constituencies and/or members are properly represented by its Councilors when the Council votes on a matter.
   2. The first sentence of the last paragraph on page 93 says: “Under this model, no Constituency’s nominees could hold a majority of that SG’s Council positions, even if they won all the remaining elected positions.”
   3. Westlake appears to be assuming here that GNSO Councilors have the freedom to vote according to their own personal wishes or the direction of his/her own Constituency. This may be true for some SGs but it definitely is not true of all SGs. In the case of the NCSG, which does not direct the voting of its elected councilors, councilors are held accountable to the entire membership of the SG regardless of whether the SG members are members of one, both or none of its two constituencies.
   4. For SGs that direct their Councilors regarding how to vote, individual Councilors would have to vote according to the SG directions regardless of what their personal or Constituency position was. So it wouldn’t matter whether a Constituency had one vote or a majority of votes on the Council.
   5. The top paragraph on page 94 says: “We have been advised that, when the current structure was developed, there were concerns that to allow an automatic allocation of Council seats to Constituencies might lead to a rush of Constituency applicants. Clearly, this has not occurred.”
   6. Westlake is correct that this has not occurred, but the reason it has not happened could very well be because ‘automatic allocation of Council seats to Constituencies’ was not done.
   7. Westlake’s point here is not clear. They are recommending ‘automatic allocation of Council seats to Constituencies’ and thereby risking a rush of Constituency applicants. (See item 4 above.)

Working Party Conclusion and Recommendation

The Working Party believes that Recommendation 23 should not be approved at this time. The WP together with the GNSO community should first be given the opportunity to conduct its own internal assessment and, if there are some problems that need to be solved, develop possible solutions for them.

The Review Working Party was unaware that Westlake would revise and substantially change Recommendation 23 at the last minute without providing us an opportunity to comment. This Revised Recommendation 23 is made without input from the Working Party. It is noteworthy to mention that a number of comments were submitted to members of the Westlake team during discussions at session at the ICANN 53 meeting in Buenos Aires with rationales that contradict Recommendation 23. These were included in a document prepared by ICANN staff, and was posted to the public comment forum during the public comment period on the GNSO review draft report[[1]](#footnote-1). This only adds to the confusion of why Recommendation 23 was changed in the final report.

We wish to reiterate that 35 other recommendations made by Westlake are still being reviewed and discussed by the Working Party. Many of those 35 recommendations were generally supported in the community and could be very valuable for the GNSO to implement in the near future. We have scheduled subsequent meetings for the Working Party to review and discuss these recommendations, prioritize them and provide feedback on implementation. We appreciate you taking our serious concerns about Revised Recommendation 23 under consideration and will look forward to presenting future comments on the other 35 recommendations in the near future.

1. Summary of Comments from Sessions at ICANN53: <http://forum.icann.org/lists/comments-gnso-review-01jun15/pdfdG81WdzuPx.pdf> [↑](#footnote-ref-1)